TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1966 and 73-1971

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,
Appellants,

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL., *Appellees.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Columbia

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MOTION OF THE INSTITUTE OF SCRAP IRON AND STEEL, INC. TO DISMISS

Appellee, Institute of Scrap Iron and Steel, Inc., was granted leave by the lower court to intervene June 27, 1973, subsequent to the previous consideration of

this case by this Court. It has participated fully in the administrative proceeding before the Interstate Commerce Commission (ICC).

I. THESE APPEALS MUST BE DISMISSED FOR LACK OF JURISDICTION

Appellee, Institute of Scrap Iron and Steel, Inc., respectfully moves, pursuant to Rule 16 of this Court, to dismiss the appeals of *Aberdeen and Rockfish Railroad Company, et al.* and *United States and Interstate Commerce Commission,* Nos. 73-1966 and 73-1971, because this Court does not have jurisdiction. Appellants ground jurisdiction on 28 U.S.C. § 1253. No jurisdiction exists under § 1253 because no party appeals "from an order granting or denying . . . an interlocutory or permanent injunction."[1]

The two cases cited by Appellants in support of their contention that jurisdiction exists, *Baltimore & Ohio R.R.* v. *United States,* 386 U.S. 372 (1967) and *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972), were appeals from orders denying an injunction which had been sought by the appellant or appeals from orders granting an injunction which had been op-

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[1] 28 U.S.C. § 1253, upon which Appellants based this Court's jurisdiction [Government's jurisdictional statement (Gov. J.S.) p. 2, and the Railroad's jurisdictional statement (R.R.J.S.) p. 2] provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 U.S.C. § 2101(b), cited by the ICC in its jurisdictional statement, p. 2, merely sets forth the time in which appeals under § 1253 must be brought.

posed by the appellants.[2] Appellants, in the instant case, successfully opposed injunctive relief in the court below.[3] The cases cited, thus, are inapposite. "[T]he successful party below has no standing to appeal from the decree denying the injunction." *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 at 206 (1939).

The instant case must be dismissed without direction to the lower court because the jurisdictional issue obviously is settled. *Cf. Phillips* v. *United States*, 312 U.S. 246 at 254 (1941) and *Rorick* v. *Bd. of Comm'rs*, 307 U.S. 208 at 213 (1939). In any case, it is clear that the questions presented are not sufficiently substantial to merit appellate review.

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[2] *Baltimore and Ohio R.R.* v. *United States, supra*, involved an appeal by parties who had sought an interlocutory injunction which was denied by the district court. *United States* v. *Allegheny-Ludlum Steel Corp., supra*, involved two separate cases, one in which the plaintiff had sought and been denied an injunction and the other in which the ICC had opposed an injunction which was granted by the lower courts.

[3] The district court's judgment provides that:

"[T]he Interstate Commerce Commission's orders of October 4, 1972 and May 2, 1973 in Ex Parte 281 are vacated and this case is remanded to the Commission for further proceedings consistent with the opinion in this case."

In its opinion, the Court stated:

"[W]e refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration." *Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)* v. *United States*, 371 F. Supp. 1291 at 1293 (D.D.C. 1974).

II. THESE APPEALS SHOULD BE DISMISSED BECAUSE THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Apart from jurisdictional grounds, the instant appeal should be dismissed because the questions presented are not substantial. In essence, four questions are presented by Appellants in their jurisdictional statements. In examining these questions, it is necessary to place the lower court's decision in its proper perspective.

This decision does not prejudice the financial position of the railroads. As the appellant railroads concede in their jurisdictional statement (R.R.J.S. at 14), "the increases on recyclables were placed in effect [June 10, 1973] *and continue in effect today.*" [emphasis added.] The railroads are not precluded by the lower court's decision from seeking further rate increases on recyclable commodities.

What this decision does do is simply stated: it requires the ICC to comply with the procedural requirements of the National Environmental Policy Act (NEPA) before the Commission gives its official blessing to the rate increases. As the ICC has pointed out, the decision of the lower court has a technical effect on the burden of proof in the event that a shipper challenges a particular rate.[4]

Strict compliance with NEPA in the instant case is necessary, even though this proceeding should not be viewed as typical of all future ICC rate-making proceedings. Rather, it must be viewed as the crucial test of the question of whether the ICC will give full credence to the procedural mandates of NEPA in evaluat-

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[4] The ICC concedes that the primary result of vacating its October 4, 1972 and May 2, 1973 orders is that the burden of proof does not shift automatically to shippers (Gov. J.S. at 13).

ing whether freight rates for recyclable commodities are discriminatory. The full consideration of such issues as the discriminatory effect of general rate increases or of the existence of discrimination in the underlying rate structure in this proceeding, as required by NEPA, may well establish the precedent for consideration of similar issues in future proceedings before the Commission.

In summary, the lower court's decision poses no threat either to the financial position of the nation's railroads or to the orderly administration of the Interstate Commerce Act. This decision, however, does maintain the integrity of NEPA by requiring the Commission to observe the Congressional mandate that it consider fully the environmental impact of its actions.[5] Viewed in this perspective, the questions presented by Appellants in their jurisdictional statements are insubstantial. Summary dismissal of these appeals or affirmance of the lower court's decision would be warranted even if the threshhold jurisdictional bar in 28 U.S.C. § 1253 were not present.[6]

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[5] Strict compliance by the ICC is important. A number of courts have been critical of the recalcitrance of the Commission in acknowledging and complying with the mandates of NEPA, *Harlem Valley Transp. Ass'n* v. *Stafford*, No. 73-2496, slip opinion No. 685 at 4278 (2d Cir. 1974); *City of New York* v. *United States*, 337 F.Supp. 150 at 158 (E.D.N.Y. 1972); *Chemical Leaman Tank Lines* v. *United States*, 368 F.Supp. 925 at 948 (D.Del. 1973); *S.C.R.A.P.* v. *United States*, 346 F.Supp. 189 at 194, n.8 (D.D.C. 1972).

[6] Rule 16(1)(c) and (d) of the rules of this Court.

The four questions raised by Appellants follow:

A. The Railroads Assert Lack of Jurisdiction in the Lower Court To Review the General Revenue Order for Failure To Comply with NEPA

In contrast to the clear jurisdictional barrier raised by 28 U.S.C. § 1253 to prosecution of the instant appeal, the Appellant railroads rely on unclear judicial precedent in seeking to deny the right of judicial review of the Commission's compliance with NEPA.[7] In *Atchison, Topeka and Santa Fe Ry. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800 (1973), this Court recognized that the jurisdictional issue is not settled.[8]

The lower court in the instant case held that even if there were no provision for review in the Interstate Commerce Act, NEPA conferred jurisdiction upon the courts to review for compliance with NEPA any major Federal action significantly affecting the quality of the human environment. The ICC order was such action.[9] Appellant railroads' expansive reading of *S.C.R.A.P., supra* (R.R.J.S. at 17-18), to the effect that NEPA made no change in the jurisdictional standards previously established for Interstate Commerce Act pro-

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[7] R.R.J.S. at 17-22.

[8] This Court observed that "serious questions" exist concerning the jurisdiction of district courts to review general revenue orders, 412 U.S. 800 at 814, n.10. This Court, in two recent cases arising under the Interstate Commerce Act without the additional issues posed by NEPA, left standing, by an equally divided court, the lower court holdings of lack of jurisdiction. *Atlantic City Elec. Co.* v. *United States,* 306 F.Supp. 338 (S.D.N.Y. 1969); *Alabama Power Co.* v. *United States,* 316 F.Supp. 337 (D.D.C. 1969), *aff'd.* 400 U.S. 73 (1970).

[9] 371 F.Supp. at 1297-8. See also, *Comm. for Nuclear Responsibility* v. *Seaborg,* 463 F.2d 783 (D.C.Cir. 1971), discussed by the lower court at n.22.

ceedings, is not supported by the Court's opinion. *S.C.R.A.P.* dealt only with the jurisdiction of the lower court to order injunctive relief in the course of a general revenue proceeding. The Court specifically noted that it was not expressing a view on the jurisdiction of the lower court to review the general revenue order for compliance with NEPA.[10]

It is unnecesary for this Court to reach the question of whether there may be judicial review of general revenue orders. First, NEPA review of general revenue orders is unlikely to be a recurring issue in the courts since the present administrative proceeding should resolve many of the fundamental issues involved. Second, a case with the peculiar permutations created by the applicability of NEPA to general revenue proceedings is not an appropriate case to resolve the fundamental question under the Interstate Commerce Act of the reviewability of general revenue orders.

B. The ICC Asserts that It May Decide When It Will Comply With NEPA

Although stating that "the Commission is well aware of the need for a thorough study of the basic railroad freight rate structure . . . ," (Gov.J.S. at 14), it asserts in its jurisdictional statement that it has exclusive discretion to determine when it will comply with NEPA (Gov.J.S. at 15-17) by doing so. Congress made no provision for such agency discretion in § 102 of NEPA. To the contrary, Congress mandated that:

> "[A]ll agencies of the Federal Government *shall* . . . (1) include in *every* major Federal action significantly affecting the quality of the human envir-

[10] 412 U.S. 669 at 698, n.22.

onment, a detailed statement . . . on the environmental impact of the proposed action . . . ."[11] [emphasis added]

The President's Council on Environmental Quality has indicated in the guidelines on the preparation of environmental impact statements which it addressed to all Federal agencies that the cumulative effect of governmental actions are to be considered by each agency in its review of specific agency actions.[12] The Court of Appeals for the District of Columbia Circuit has affirmed the obligation of an agency to take into account decisions predating enactment of NEPA when a subsequent decision relating to the same matter is properly before the agency. *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n,* 449 F.2d 1109 at 1128-9 (D.C.Cir. 1971). The obligation of the ICC to consider all aspects of the question of the impact of freight rates on recyclable commodities is so clear as not to require further judicial review in this proceeding.

C. Appellants Assert that the Lower Court Improperly Reviewed the Commission's Substantive Determinations

Both the railroads and the ICC have asserted in their jurisdictional statements that this Court should review the lower court's decision because that decision was predicated upon its disagreement with the conclusions

[11] 42 U.S.C. § 4332(2).

[12] "The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view of the overall, *cumulative impact* of the action proposed (and of further actions contemplated) . . . ." [emphasis added] (Sec. 5(b), 36 Fed. Reg. 7724, revised August 1, 1973, § 1500.6(a), 38 Fed. Reg. 20550)

set forth in the Commission's impact statement (R.R. J.S. at 22-27 and Gov.J.S. at 18).[13]

The lower court specifically disavowed review of the statement on the merits, making clear that it reviewed that statement only for compliance with the procedural requirements of NEPA:

> "Any substantive review would be predicated on Section 101 of the Act . . . . However, because we view the Commission's efforts to comply with NEPA's procedural commands to be sorely deficient, we do not reach the question whether the Commission clearly gave insufficient weight to this environmental value." [14]

Appellants suggest that because the lower court questioned whether the ICC had come to grips with the environmental issues in good faith, it substituted its judgment on the question of whether the freight rates on recyclable commodities should be increased.

As Appellants acknowledge,[15] the basic test evolved by the lower courts for testing an agency's compliance with the procedural mandate of § 102(2) of NEPA is whether the agency has made a good faith effort to prepare an adequate, rather than a perfunctory, examina-

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[13] The railroads define the issue presented as "whether NEPA intended to sanction judicial review . . . of the substantive merits of the agency's impact statement determinations," R.R.J.S. at 22. The Government suggests that "the court substituted its judgment for that of the ageney concerning the matters discussed in the impact statement," Gov.J.S. at 18.

[14] 371 F.Supp. at 1299.

[15] R.R.J.S. at 22 and Gov.J.S. at 17.

tion of the environmental implications of the action or series of actions under consideration.[16]

The lower court in the instant case found that the ICC had not engaged in the good faith analysis required by NEPA. It based this finding in large part on the failure of the Commission to consider or to respond to issues raised repeatedly during the proceeding before the Commission, not only by environmental and shipping interests, but also by other governmental agencies, including the Enviromental Protection Agency, the Council on Environmental Quality and the Department of Commerce.[17]

This *procedural* review of the impact statement—to determine whether issues and viable alternatives are considered in sufficient detail and in good faith—is essential if the judiciary is to exert more than perfunctory supervision over compliance with NEPA. This review is clearly distinguishable from *substantive* re-

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[16] *Environmental Defense Fund* v. *Corps of Engineers*, 342 F. Supp. 1211 at 1214 and 1217 (E.D.Ark. 1972); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F.2d 289 at 296 (8th Cir. 1972); and *Sierra Club* v. *Froehlke*, 359 F.Supp. 1289 at 1342 (S.D.Tex. 1973).

[17] In this connection, it is important to note that the lower court's conclusion of procedural inadequacies is an affirmance of the findings of the Federal agencies charged with administering NEPA. Both EPA and CEQ pointed out inadequacies in the ICC's draft impact statement. EPA gave the statement an "inadequate rating" and wrote again to the Commission following publication that the statement was inadequate. See letter of Russell E. Train, Chairman, CEQ, to George M. Stafford, dated April 17, 1973; letter of Sheldon Meyers, Office of Federal Activities, EPA, to Robert L. Oswald, dated April 19, 1973; and letter of John Quarles, Acting Deputy Administrator, EPA, to Robert L. Oswald, dated June 6, 1973, all part of the record in the court below.

view, where the question is not one of whether the issues and alternatives were given sufficient consideration, but one of whether arbitrary or capricious conclusions were reached by the agency after the requisite procedural compliance.[18] The issue sought to be raised by Appellants is not present, since the lower court did not challenge the conclusions of the ICC, but merely the adequacy and good faith of the Commission's consideration of the environmental impact.

Even if this Court had jurisdiction to review this appeal, it would be undesirable for the Court to review the lower court's determination of inadequate procedural compliance. This would require the Court to become enmeshed in the voluminous record in this case in order to determine whether a good faith effort at compliance with the requirements of NEPA occurred.[19]

Appellate review of the lower court's finding that the ICC had not complied with the procedural requirements of NEPA is unwarranted.

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[18] The test of substantive review of agency actions under NEPA was set forth in *Calvert Cliffs' Coord. Comm.* v. *Atomic Energy Comm'n, supra,* at 1115:

> "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values . . . ."

[19] This Court, on numerous occasions, has noted the limited scope of review of questions such as that raised by Appellants, *e.g., Nat'l Labor Relations Bd.* v. *Pittsburgh Steamship Co.,* 340 U.S. 498 at 502-503 (1951); *Nat'l Labor Relations Bd.* v. *American Nat'l Ins. Co.,* 343 U.S. 395 at 410 (1952).

D. Appellants Assert that the ICC Should Not Be Required To Hold a Hearing on Its Draft Impact Statement

Appellants have asserted that it was error for the lower court to direct the Commission on remand to hold oral hearings on the draft impact statement (Gov.J.S. at 18-21 and R.R.J.S. at 29-32). Since the lower court found the failure to hold a hearing to be only one indication that the ICC failed to undertake good faith procedural compliance with NEPA, the issue raised by Appellants is in reality a request for an advisory opinion on how the Commission should conduct itself on remand in light of the lower court's suggestion that a "presumption" exists that oral hearings are required.[20]

The existing ICC review process in general revenue proceedings encompasses both oral hearings and oral argument. Such hearings and argument were conducted in the course of the administrative proceeding before the Commission prior to issuance of the order of October 4, 1972, approving the rate increases, which order was vacated by the lower court. The district court's presumption that the Commission also should hold oral hearings on the revised impact statement in order to comply with NEPA's mandate that the impact statement be part of the "existing agency review process" does not present this Court with an issue of substance.

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[20] A presumption confirmed by the Second Circuit, June 18, 1974, in *Harlem Valley Transp. Ass'n* v. *Stafford, supra,* at 4289-4292, where the court held that the ICC was required to prepare a draft environmental impact statement prior to its hearing on abandonment of rail lines. This requirement was based on the affirmative obligation of the ICC to develop the environmental issues rather than await their presentation by environmental interests.

CONCLUSION

The appeals should be dismissed (1) because of clear lack of jurisdiction; (2) even were there jurisdiction, because of the insubstantial nature of the questions presented.

Respectfully submitted,

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August 1974